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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ARTHUR L. McINTYRE et al., Plaintiffs and Appellants, v. CRUISE AMERICA, INC., Defendant and Respondent.	A105212 (Alameda County Super. Ct. No. RG 03078571)

Georgia McIntyre was tragically killed in a collision between her vehicle and a large motor home, which had been stolen from defendant Cruise America, Inc.'s motor home rental lot by persons unknown. The decedent's survivors sued Cruise America for damages due to their losses. The trial court granted summary judgment, holding defendant owed no duty of care to a third party injured by a thief who stole a motor home from its fenced lot. We agree, and affirm.

I. SUMMARY OF FACTS

The parties do not dispute the essential facts. Defendant Cruise America operates a motor home rental facility on 66th Avenue in Oakland. The facility is a lot surrounded by an eight-foot fence topped with razor wire, and has a gate. The gate is left open during business hours. The rental office is located adjacent to the gate.

At about 10:40 a.m., a family returned a vehicle they had rented to defendant's facility. The vehicle was 25 feet long and weighed approximately 15,000 pounds. The vehicle was left in the "return line" near the exit gate. There is no guard at the gate. Defendant's rental agent allowed the family to retain the keys after checking in the

vehicle so they could complete the gathering and removal of their personal belongings from the vehicle. The agent instructed the family to return the keys to the rental office before leaving. At about 2:00 p.m. the same day, the agent noticed that the motor home was missing, whereupon she called "911" to report the vehicle stolen. The family had not returned the keys to the agent. Within hours, one of defendant's employees was notified that the motor home had been involved in an accident and had been recovered.

Plaintiffs sued Cruise America and numerous Doe defendants. In the complaint they allege that decedent was killed in an accident with the stolen motor home and that the persons who were operating the motor home are unknown.[1]

The trial court granted defendant's motion for summary judgment, concluding that, on the undisputed facts, plaintiffs cannot show that defendant owed a duty to plaintiffs' decedent as a matter of law. This timely appeal followed.

II. DISCUSSION

A. Standard of Review

On appeal from a summary judgment we undertake de novo review of the proceedings below, and independently examine the record to determine whether triable issues of material fact exist. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767; *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.) "In ruling on the motion, the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom ([Code Civ. Proc.,] § 437c, subd. (c)), and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843.) Any legal issues are also reviewed de novo. (*Squaw Valley Ski Corp. v. Superior Court*

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[1] Defendant presented evidence that no agent or employee of Cruise America was driving the motor home at the time of the accident. Although plaintiffs dispute this fact as not being based on the declarant's personal knowledge, and make passing reference to this evidence as "assumptions" and "speculation," they advance no claim here, and advanced none below, that any of defendant's employees or agents were driving the vehicle.

(1992) 2 Cal.App.4th 1499, 1506.) In reviewing the propriety of a summary judgment, we resolve all doubts in favor of the party opposing the judgment. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 183 (*Palma*).)

B. Analysis of the Issue of Duty

Defendant's summary judgment motion was based primarily upon the rule enunciated in *Richards v. Stanley* (1954) 43 Cal.2d 60, 65 (*Richards*) and restated in *Palma, supra*, 36 Cal.3d at page 183: "[O]rdinarily the duty of an owner of an automobile to use due care in the maintenance or operation of that automobile does not encompass a duty to protect others from the negligent operation of that vehicle by a thief, even when the owner has left the keys in the ignition." The court in *Richards* acknowledged, however, that "special circumstances," such as leaving the car in the charge of an intoxicated passenger, might override this rule and establish such a duty of care to the injured party. (*Richards, supra*, 43 Cal.2d at p. 66.)

The California Supreme Court began to delineate the contours of these "special circumstances" in *Richardson v. Ham* (1955) 44 Cal.2d 772 (*Richardson*). There, a 26-ton bulldozer was left unattended and unlocked at a construction site. Two youths were able to start its engine. After enjoying a ride on the bulldozer, they were unable to stop it, so they merely abandoned it. Thus set in motion, the bulldozer wreaked a great deal of havoc in terms of property damage and personal injuries before coming to a halt against a retaining wall. (*Id.* at pp. 774-775.) The injured parties sued the bulldozer's owner, the jury found no liability, and the trial court granted a motion for new trial based, inter alia, on insufficiency of the evidence. Defendant appealed arguing that under *Richards* it owed no duty to the plaintiffs as a matter of law.

The Supreme Court affirmed the new trial order. The court pointed to extensive evidence that defendant's bulldozers aroused curiosity and attracted spectators even when they were not in use, and that "curious persons had been known to climb on them." (*Richardson, supra*, 44 Cal.2d at p. 776; see *id.* at pp. 780-782 (conc. opn. of Carter, J.).) Further the court noted that the risk of danger flowing from an intermeddler stealing a 26-ton bulldozer—as compared to an automobile—was "enormous," both because of its

weight and power and because it can be expected that a thief would not know how to operate it. The court concluded: "The extreme danger created by a bulldozer in uncontrolled motion and the foreseeable risk of intermeddling fully justify imposing a duty on the owner to exercise reasonable care to protect third parties from injuries arising from its operation by intermeddlers." (*Id.* at p. 776.)

Subsequent cases have further developed the *Richards* rule and the special circumstances exception. These precedents are cogently summarized in *Avis Rent a Car System, Inc. v. Superior Court* (1993) 12 Cal.App.4th 221, 224-233 (*Avis*), and we need not duplicate that review here. It is sufficient to state that "special circumstances" have been found in two general categories of factual situations: Either the type of vehicle itself presents a special danger (e.g., *Ballard v. Uribe* (1986) 41 Cal.3d 564, 573 (*Ballard*) ["aerial manlift" on truck with broken stabilizing cable]; *Richardson, supra*, 44 Cal.2d at p. 776 [bulldozer]) or the conditions in which the vehicle was left are tantamount to "an invitation to theft" (e.g., *Palma, supra*, 36 Cal.3d at pp. 184, 186 ["large commercial truck . . . left unlocked with keys in it overnight in an open parking lot located in a high crime industrial area"]; *Hergenrether v. East* (1964) 61 Cal.2d 440, 442, 445 (*Hergenrether*) [unlocked truck loaded with gasoline, guns and equipment left unattended at night in skid-row area with keys in ignition]; *Murray v. Wright* (1958) 166 Cal.App.2d 589, 590-591 [car dealer purposely left keys in ignitions of all vehicles on car lot to encourage potential buyers to take cars for test drives " 'without regard for the fitness or competence of said general public to do so' " and this practice was a matter of common knowledge in the vicinity].)

On the other hand, with only one exception, courts have been unanimous in rejecting liability for careless car owners. (*Richards, supra*, 43 Cal.2d 60; *Archer v. Sybert* (1985) 167 Cal.App.3d 722; *Kiick v. Levias* (1980) 113 Cal.App.3d 399; *Hosking v. San Pedro Marine, Inc.* (1979) 98 Cal.App.3d 98 (*Hosking*); *Brooker v. El Encino Co.*

(1963) 216 Cal.App.2d 598; *Holder v. Reber* (1956) 146 Cal.App.2d 557; *Avis, supra*, 12 Cal.App.4th 221.)[2]

Plaintiffs contend that the motor home is not an ordinary vehicle but, like the bulldozer, is a large (25 feet long), heavy (7.5 tons) "attractive nuisance." Plaintiffs argue that these facts, coupled with the agent's failure to secure the keys and the lack of security at the exit gate, constitute the special circumstances necessary to impose a duty on defendant to protect potential victims from thieves who might steal from defendant's lot and drive recklessly.[3] We cannot agree.

As to the characterization of the motor home as an "attractive nuisance," plaintiffs cite to no evidence or authority but merely argue that "most people are unfamiliar with motor homes, which may appear to promise the opportunity for a 'good time.' " One could argue with equal cogency that thieves would eschew the opportunity to steal a 25-foot motor home given its high visibility and clumsiness. But owning a vehicle attractive to thieves, combined with careless conduct, does not overcome the *Richards* rule in any event. For example, the court in *Hosking* found no special circumstances where a truck was left at night in an alley with the door open, the lights on, the motor running and the keys in the ignition, coupled with proof that the vehicle taken was particularly popular with juvenile auto thieves and that the area of the theft was only one block from a high school. (*Hosking, supra*, 98 Cal.App.3d at pp. 100-101, 104.)

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[2] The exception is *Enders v. Apcoa, Inc*. (1976) 55 Cal.App.3d 897. This case was distinguished in *Avis* on the ground that in *Enders*, the court confused foreseeability in the proximate causation sense with foreseeability as it should figure in the duty analysis. (See *Avis*, *supra*, 12 Cal.App.4th at pp. 231-233.) We agree with *Avis* that "[b]y focusing on foreseeability, the *Enders* court bypassed the important policy questions involved in the duty analysis." (*Id.* at p. 232.)

[3] Plaintiffs contend two additional factors contribute to the special circumstances in this case: first, that defendant's facility is located in a high crime area and, second, that large motor homes pose an increased danger "when driven by people who are not familiar with their operation." But there is no evidence in the record to support the claim that defendant's facility is located in a high crime area or that the operation of a motor home is substantially different than the operation of an automobile.

The decision in *Avis* also supports our conclusion. There, an individual was injured as a result of an accident caused by a young woman driving a car stolen a week earlier from the Avis rental return lot. Plaintiffs presented evidence that Avis routinely left the keys in a rental car for up to 45 minutes during the check-in process; that during this time the cars were moved around to be cleaned, washed, and refueled; that there was no fence or wall around the check-in lot; that there was no guarded gate at the exit point; that Avis had been warned about security problems; that other cars had been stolen from the check-in area and, in fact, the driver who injured plaintiff had previously stolen a car from the same lot; and that Avis routinely did not report a stolen car to the police for a period of two to three weeks. (*Avis, supra,* 12 Cal.App.4th at pp. 222-223.) Despite this showing the court held that "Avis's conduct of parking its cars in a negligently attended lot with keys in the ignitions did not create a duty to control the conduct of a thief. It is true that the risk of theft increases when more cars are involved and when they are in a fixed location. . . . But this increase in the risk of theft due to negligence of an owner of a fleet of cars is much like the increased risk associated with leaving keys in the ignition of a car left unattended on the street. It is not equivalent to inviting or enticing an incompetent driver to tamper with a vehicle. These actions are not the 'special circumstances' which create a special relationship between or among the parties. Thus, they do not impose on the car owner the duty to control the actions of the thief." (*Id.* at p. 233.)

As pointed out by plaintiffs, a court's task in determining duty "is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." (*Ballard, supra*, 41 Cal.3d at p. 573.) "[E]ach case must be considered on its own facts to determine whether the joint effect of them in toto justifies the conclusion that the foreseeable risk of harm imposed is unreasonable, and that the defendant owner . . . has a duty to third persons in

the class of the plaintiffs to refrain from subjecting them to such risk." (*Hergenrether, supra*, 61 Cal.2d at p. 445.)

Except for the fact that the vehicle stolen was a large motor home rather than an automobile, the conduct in this case is functionally indistinguishable—if not less reprehensible—than the conduct in *Richards*, *Hosking*, or *Avis.* Here, defendant's agent did not leave the keys in the ignition of the vehicle but merely allowed the family returning the motor home to retain the keys while unpacking. Although defendant's agent did not take affirmative steps to ensure the keys were returned, nothing in this scenario suggests that it was more likely the keys would be left in the motor home's ignition rather than being returned to another agent or absent-mindedly pocketed by the driver returning the vehicle. Plaintiffs make much of the absence of a gate guard and the proximity of the motor home to the open gate, but the evidence shows there had not been a theft of a vehicle from the lot in seven years, despite the fact that the gate was always left open during business hours and the fact that defendant's rental agents were given discretion to allow customers to retain the keys after check-in for their convenience.[4]

In sum, the vehicle here, although very large, did not pose the kind of special danger presented by a bulldozer or a "manlift," and defendant's conduct in failing to ensure the return of the keys was not tantamount to an invitation to theft. As noted, our task here is to evaluate "whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced. . . ." (*Ballard, supra*, 41 Cal.3d at p. 573.) We conclude the failure to ensure the return of keys to a motor home for a period of hours, even on an open, unguarded lot, does not constitute a category of negligent conduct that is sufficiently likely to result in the kind of harm that resulted here.

III. DISPOSITION

The judgment is affirmed.

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[4] Plaintiffs argue "[t]here have been thefts from [defendant's] facility." But the evidence cited refers to thefts of items from the vehicles during the night, not thefts of the vehicles from the lot.

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RIVERA, J.

We concur:

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KAY, P.J.

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SEPULVEDA, J.